No. 86-1594

In the Supreme Court of the United States

OCTOBER TERM, 1986

LEANDER MAX SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that (1) the district court erred when it refused his request to immunize a defense witness, and (2) the evidence was insufficient to support his conviction.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 18 counts of mail fraud. He was sentenced to concurrent terms of five years' imprisonment, $17,000 in fines, and five years' probation. The court of appeals affirmed by unpublished order. Pet. App. A.

In June 1982 petitioner and co-defendant W. Ed Herder operated a mail solicitation business known as United States Testing Authority (USTA).[1] Petitioner and Herder

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[1]The statement of facts is taken from the government's brief in the court of appeals.

caused USTA to mail hundreds of thousands of solicitations to the general public nationwide, offering a valuable prize free of charge in exchange for returning a survey card on television viewing habits and a $14.80 handling fee. Contrary to the representation made in the literature sent to the public, USTA had no client for its survey. Moreover, the "prize" awarded to 9,999 of every 10,000 individuals who responded to the solicitation was merely a membership in a financially unsuccessful film processing club owned by petitioner and Herder. One in 10,000 persons received one of the prizes listed in the solicitation that had a minimal value.

Concerned that no use was being made of the information furnished by those who responded to USTA's survey, petitioner prevailed upon Herder to commission a survey of the responses. The survey was not completed, in part because petitioner and Herder stopped paying for the services of the individual they had retained to analyze the responses.

The scheme led to an investigation by the United States Postal Service and an order issued by postal authorities ceasing delivery of mail to USTA. As a consequence, in September 1982 USTA closed its business. At the same time petitioner and Herder established a successor to USTA, which they called American Testing Institute (ATI). They prevailed upon an employee, an elderly bookkeeper, to agree to be listed as the president of ATI on corporate documents. However, Herder and petitioner maintained direct control over ATI's daily operations. The business format engaged in by ATI was identical to that of its predecessor. Petitioner and Herder even continued to use the same printer. They told the printer that if asked about petitioner and Herder, he was to reply that they were merely consultants to ATI and had no other connection with the company.

In time, a number of the recipients of "awards" complained to petitioner and Herder by mail and telephone. Petitioner and Herder ridiculed the complaints and frequently threw them away without responding to them. An employee was told to hang up on people who called and demanded refunds. By early 1983, the Postal Service had stopped delivering mail to ATI.

Thereafter, government investigators examining the bank accounts of USTA and ATI discovered that more than 225,000 checks in the amount of $14.80 each had been deposited, for a total dollar amount in excess of $3,325,000. Between July 1982 and March 1983, USTA and ATI disbursed $1,715,000 to Herder and his mother. Another $183,000 was paid to petitioner during that period.

2. At trial, petitioner asked the court to compel the government to immunize or to grant judicial immunity to Peter Gayle, whom the defense proposed to call as a defense witness. Petitioner proffered to the court that Gayle would reveal that he and Herder—and not petitioner—devised and implemented the USTA scheme; that Gayle received $556,000 from the scheme; and that Gayle authored the letter and survey card that was mailed to the public by USTA (10 R. 1202-1205). In response to a proffer by petitioner's co-defendant's counsel, the government confirmed that Gayle had appeared before the grand jury under an agreement that barred the government from using his grand jury testimony against him, but that the informal immunity agreement did not extend to the trial (*id.* at 1213-1215). Gayle was not summoned as a witness for the prosecution.

The court denied petitioner's motion (10 R. 1216). Moreover, the court examined Gayle's grand jury testimony in camera and advised petitioner that the testimony was not exculpatory (*ibid.*).

3. Petitioner alleges that the government's limited immunization of Gayle constituted an abuse of process, which the court was duty-bound to remedy by immunizing the witness at trial. That argument is insubstantial. No violation of petitioner's due process rights resulted from the informal immunity agreement between the government and Gayle in the grand jury proceeding, and the district court was not authorized to grant immunity to Gayle.

This Court never has recognized the existence of judicial authority to immunize defense witnesses absent a request from the government. The federal immunity statute (18 U.S.C. 6003(b)) vests the power to grant immunity in the Executive Branch rather than the Judiciary. The Court accordingly has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). See *id.* at 253-254. The corollary of this principle is that "[n]o court has authority to immunize a witness" (*id.* at 261; see *id.* at 262). See also *United States* v. *Doe*, 465 U.S. 605, 616-617 (1984). Following these principles, the courts of appeals have overwhelmingly ruled that judges may not immunize defense witnesses without a request from the prosecution.[2]

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[2]See, *e.g.*, *United States* v. *Whittington*, 783 F.2d 1210, 1219-1220, on rehearing, 786 F.2d 644 (5th Cir. 1986), cert. denied, No. 85-1974 (Oct. 6, 1986); *United States* v. *Pennell*, 737 F.2d 521, 526-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Gottesman*, 724 F.2d 1517, 1524 (11th Cir. 1984); *United States* v. *Bounos*, 693 F.2d 38, 39 (7th Cir. 1982); *United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976).

Prior to this Court's decisions in *Doe* and *Conboy*, the Third Circuit held that a district court may immunize a defense witness when that witness has essential, exculpatory information that is unavailable from other sources. See *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980). Whatever the validity of the Third Circuit's rule, it is applicable by its terms only when the defendant makes "a convincing showing" that the proffered testimony is "both clearly exculpatory and essential to the defendant's case." *Id.* at 972. In addition, "[i]mmunity will be denied if the proffered testimony is found to be * * * cumulative." *Ibid.* The Third Circuit thus has found a judicial grant of immunity appropriate only when there is "a probable certainty that * * * [the] expected testimony would * * * in itself exonerate [the defendant]." *United States* v. *Lowell*, 649 F.2d 950, 965 (1981) (emphasis in original). See also *United States* v. *Steele*, 685 F.2d 793, 808, cert. denied, 459 U.S. 908 (1982).

Although the Third Circuit's approach to the issue is different from that of other circuits, there is no need for the Court to address that difference in this case. First, the Third Circuit has yet to determine whether its recognition of judicial immunity survives this Court's remarks in *Doe* and *Conboy*. In light of those intervening decisions, the Third Circuit may reconsider its analysis of the issue of defense witness immunity. Second, petitioner has not demonstrated that he would have obtained a favorable ruling on his request to immunize Gayle even in the Third Circuit. Petitioner failed to show that Gayle would give unambiguous testimony that clearly exculpated petitioner. Indeed, according to the proffer, Gayle was not at all involved in ATI; he ceased his association with Herder before USTA was displaced by ATI. Even if, as petitioner proffered, Gayle helped Herder originate the scheme, realized a substantial profit from it, and authored the survey card and letter

mailed to the public, petitioner remained criminally liable for his knowing and active participation in the fraudulent activity that went far beyond the matters to which Gayle might have testified. Moreover, the district court, which examined Gayle's grand jury testimony, specifically determined that it was not exculpatory (10 R. 1216). In sum, the "[d]ifferences among the circuits are here a strawman because [petitioner] fails all their tests." *Autry* v. *Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984).

4. Petitioner claims (Pet. 34-35) that the evidence failed to show that he devised the mail fraud scheme or manifested an intent to defraud third parties. That fact-bound claim does not warrant review by this Court. The government was not required to demonstrate that petitioner helped create the fraud. Its theory of prosecution was that petitioner aided and abetted his co-defendant in executing the illicit scheme (11 R. 1262-1263, 1317, 1323 (prosecution's closing argument)). The jury, properly instructed on aiding and abetting (*id.* at 1334-1336), rejected petitioner's contention that he was an innocent, unaware company employee performing largely ministerial chores for Herder. Among other facts, petitioner's receipt of more than $180,000 from the scheme in a period of less than a year strongly supports the government's position that petitioner was not just an innocent employee of Herder's. Because the evidence, examined in the light most favorable to the government, adequately supports the jury verdict, petitioner's claim is unpersuasive.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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